STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS ENRIQUE BELTRAN a/k/a LUIS ENRIQUE BELTRAN,

Defendant-Appellant.

UNPUBLISHED
January 14, 1997

No. 183454
LC No. 94-009373

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER SUMMERS,

Defendant-Appellant.

No. 183455
LC No. 94-009373

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,* JJ.

PER CURIAM.

Following a joint bench trial, defendants were convicted of unarmed robbery, MCL 750.530; MSA 28.798, and sentenced to five to fifteen years' imprisonment. However, those sentences were vacated and defendants were each sentenced to a term of five to twenty-two and one-half years for habitual offender, second, MCL 769.10; MSA 28.1082.[1] Defendants' respective appeals of right have been consolidated. We affirm.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Richard Rodenick was driving near Gladys St. in the City of Detroit looking for a friend, when he picked up a group of men to assist in his search. The men drove around the neighborhood, eventually stopping so that all but one of the passengers could exit the car. Rodenick testified that upon exiting, defendants punched him through the open driver's side window and then stole money and a gold chain. Rodenick added that two other men took his radio, amplifier and cassette tapes. Two days after the robbery, Rodenick selected defendants' photographs from a photo array. At trial, he identified defendants as his assailants.

Defendant Beltran first contends that he is entitled to be resentenced because the sentencing court failed to inquire into the existence of his prior conviction before enhancing his sentence pursuant to the habitual offender statute. We agree that the sentencing court failed to comply with the statute but find that the error does not necessitate resentencing. In 1994, the Legislature amended the habitual offender statutes, eliminating a defendant's statutory right to a jury determination of his underlying convictions for enhancement purposes. 1994 PA 110. Now, the statute provides:

> The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:
>
> (a) A copy of the judgment of conviction.
> (b) A transcript of a prior trial or a plea-taking or sentencing proceeding.
> (c) Information contained in the presentence report.
> (d) A statement of the defendant. [MCL 769.13(5); MSA 28.1085(5).]

In the instant case, the sentencing court neglected to specifically determine the existence of defendant's prior conviction at the sentencing hearing. Nevertheless, because information regarding the conviction was contained in the presentence investigation report and defendant does not wish to challenge the accuracy or constitutionality of the conviction, we find that remand would serve no useful purpose under the circumstances of this case. See *People v Ristich*, 169 Mich App 754, 759; 426 NW2d 801 (1988). His counsel stated:

> "Your Honor, Robert Slameka for Mr. Beltran.
>
> I read to Mr. Beltran the presentence report, your Honor. The informations [sic] is correct. As you know, it's an update from a presentence report prepared for Mr. Beltran for Judge Morrow."

Defendant Beltran argues that he was denied the effective assistance of counsel by trial counsel's failure to object to the introduction of his statement to police officers after his arrest. Review of this unpreserved issue is foreclosed because details of trial counsel's alleged deficiency are not

apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). The circumstances surrounding the making of the statement are not sufficiently developed to demonstrate that the statement was the product of a police interrogation and defendant was not informed of his *Miranda*[2] rights prior to making the statement. *People v Honeyman*, 215 Mich App 687, 694; 546 NW2d 719 (1996). Thus, we cannot determine whether the evidence was admissible and whether representation provided by trial counsel was deficient. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); reh den 447 Mich 1202 (1994). *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994).

Next, defendant Beltran argues that he was denied a fair trial by a remark of the prosecutor during his closing argument. By not objecting at trial, defendant failed to preserve this issue. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1990). No miscarriage of justice would result from the failure to review this issue because the prosecutor properly commented that the evidence was uncontradicted. *Id.*; *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Furthermore, defendant's argument in his pro-per supplemental brief that he was denied the effective assistance of counsel by trial counsel's failure to object to the remark is likewise without merit because any objection would have been futile. *Daniel, supra* at 59.

In his supplemental brief, defendant Beltran urges this Court to remand for an evidentiary hearing regarding the issue of whether witness Rodenick had an independent basis for his in-court identification of defendant. For the first time on appeal, defendant contends that the identification evidence should have been suppressed because a photographic identification procedure was improperly used when he was in custody and the photo array was unduly suggestive. While the decision to remand is within our discretion, we will not do so unless a fundamental injustice would otherwise result. *People v Starlard*, 153 Mich App 151, 153; 395 NW2d 41 (1986), vacated on other grounds and remanded 428 Mich 868 (1987). No manifest injustice would result from the failure to remand under the circumstances of this case because, as more fully explained below, the trial court properly declined to suppress the evidence when codefendant Summers presented the issues now raised by defendant on appeal. *Id.* at 153-154. Furthermore, defendant was not denied the effective assistance of counsel by trial counsel's failure to move for an evidentiary hearing or mistrial when he learned of potential challenges to the evidence because the motions would have been futile. *Daniel, supra* at 59.

Defendant Beltran also requests in his pro-per supplemental brief that we remand for an evidentiary hearing regarding his claim that the prosecutor failed to fulfill a promise not to seek enhancement of his sentence under the habitual offender statutes. Defendant alleges that a plea agreement entered into in lower court docket number 94-009303, involving a charge of aggravated stalking, MCL 750.411i; MSA 28.643(9), included a provision that the prosecutor would not seek enhancement of defendant's sentence in the instant case. "[W]here a plea is induced by an unkept promise, the mandated remedies are specific performance or vacating the plea, with considerable weight given to the defendant's preference." *People v Ceteways*, 156 Mich App 108, 120; 401 NW2d 327 (1986). When reviewing an assertion that the prosecutor failed to abide by the terms of a plea bargain, the factual record must support an allegation that a promise remains unfulfilled. *People v Davis*, 74

Mich App 624, 626; 254 NW2d 335 (1977). Here, because the record does not reveal the substance of the plea agreement with respect to the other charges against defendant, we remand for an evidentiary hearing at which defendant can create a factual record with regard to his claim that a promise remains unfulfilled.

Defendants contend that there was insufficient evidence presented at trial to convict them of unarmed robbery. The elements of the offense of unarmed robbery are: "(1) a felonious taking of property from another, (2) by force or violence or assault or putting in fear, and (3) being unarmed." *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). As always, the prosecutor must also prove beyond a reasonable doubt that the defendant was the person who committed the crime. *People v Young*, 146 Mich App 337, 338-339; 379 NW2d 491 (1985); CJI2d 7.8. Viewing the evidence in a light most favorable to the prosecution, we find that there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendants committed unarmed robbery. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, modified 441 Mich 1201 (1992); *People v Petrella*, 424 Mich 221, 269; 380 NW2d 11 (1985). Questions regarding Rodenick's credibility and the evaluation of identification testimony were properly resolved by the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991); *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1989).

Defendant Summers' remaining issues concern the photographic identification procedure by which Rodenick initially identified defendants as his assailants. Defendant initially contends that the identification evidence should have been suppressed because a photo array was improperly used when he was in custody. Subject to certain exceptions, identification by photograph should not be used "when a suspect is in custody or when he can be compelled by the state to appear at a corporeal lineup." *People v Kurylczyk*, 443 Mich 289, 298 n 8; 505 NW2d 528 (1993), cert den ___ US ___; 114 S Ct 725; 126 L Ed 2d 689 (1994). The use of photographs may be justified when there are insufficient number of persons with a defendant's characteristics available to conduct a lineup. *People v Anderson*, 389 Mich 155, 186 n 22; 205 NW2d 461 (1973); *People v Hider*, 135 Mich App 147, 150; 351 NW2d 905 (1984). Upon review of the circumstances in the instant case, we find that the trial court did not clearly err in declining to suppress the identification evidence because the police officer in charge of the lineup wanted to conduct a corporeal lineup but could not locate sufficient persons to participate. *Barclay*, *supra* at 675; *Hider*, *supra* at 150-151.

Defendant Summers also argues that the identification evidence should have been suppressed because the identification procedure was unduly suggestive. Again, we find that the trial court did not clearly err in admitting the evidence. *Barclay*, *supra* at 675. Defendant correctly notes that his wearing of a hat and red shirt, along with the location of his photo next to codefendant Beltran's in the array, may have been suggestive. A suggestive photographic lineup, however, is not necessarily a constitutionally defective one. Rather, it is only improper if under the totality of the circumstances the was a substantial likelihood of misidentification. *Kurylczyk*, *supra* at 306. In the instant case, Rodenick had ample opportunity to view defendants as they drove around the neighborhood and positively identified them two days after the robbery. While there were some discrepancies in

Rodenick's initial description of his assailants, he clarified at trial that the detailed description resembling defendant provided to police was his description of defendant, not codefendant Beltran. Upon review of the totality of the circumstances, we are not left with a definite and firm conviction that the trial court made a mistake in admitting the evidence because the suggestive aspects of the photographic array did not lead to a substantial likelihood of misidentification. *Id.* at 304-305; *Barclay*, *supra* at 675.

Affirmed, but remanded in docket no. 183454 for an evidentiary hearing on defendant Beltran's claim that the prosecutor failed to fulfill a promise not to seek enhancement of his sentence under the habitual offender statutes. We retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Michael J. Kelly
/s/ John R. Weber

[1] Rather than simply enhancing defendants' sentences for unarmed robbery pursuant to the amended habitual offender statutes, MCL 769.10-13; MSA 28.28.1082-1085, the trial court sentenced them on the underlying charge and then vacated those sentences after imposing sentences for habitual offender, second.

[2] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).